

Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions

of the United States Court of Appeals for
the Federal Circuit and the United
States Court of International Trade

Vol. 20

SEPTEMBER 24, 1986

No. 38

This issue contains:

U.S. Customs Service

T.D. 86-161 (Correction)

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U.S. Court of International Trade

Slip Op. 86-88

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 111, 171, and 178

(T.D. 86-161)

CUSTOMS REGULATIONS AMENDMENTS RELATING TO CUSTOMS BROKERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: In F.R. Doc. 86-19256, published as T.D. 86-161 on August 26, 1986 (51 FR 30336), Parts 111, 171, and 178, Customs Regulations (19 CFR Parts 111, 171, 178), were extensively revised to implement the statutory changes made by the Trade and Tariff Act of 1984 relating to the regulations of customs brokers. Under the heading "Cancellation, Suspension or Revocation of License" on page 30339 of the document, top of the second column, it states that Customs has drafted guidelines for determining the maximum penalties for certain types of violations by brokers based upon the degree of culpability and seriousness of the violation, and that such guidelines are attached to the document to be incorporated as Appendix C of Part 171, Customs Regulations. However, these guidelines were inadvertently omitted from the document when it was published. Accordingly, this document further revises Part 171 to include the guidelines for the imposition of penalties for violation of 19 U.S.C. 1641, relating to brokers.

EFFECTIVE DATE: September 25, 1986.

FOR FURTHER INFORMATION CONTACT: Steven I. Pinter or Fred Burns O'Brien, Entry, Licensing and Restricted Merchandise Branch (202-566-5765).

AMENDMENT TO THE REGULATIONS

Part 171, Customs Regulations (19 CFR Part 171), as amended by T.D. 86-161, published in the Federal Register on August 26, 1986 (51 FR 30336), is further amended by adding the following on page 30346 in the third column preceding the amendments to Part 178, Customs Regulations (19 CFR Part 178).

4. Part 171 is amended by adding Appendix C to read as follows:

APPENDIX C TO PART 171, CUSTOMS REGULATIONS—GUIDELINES FOR THE IMPOSITION OF PENALTIES FOR VIOLATIONS OF 19 U.S.C. 1641

The Trade and Tariff Act of 1984 promulgated numerous changes to the current statute relating to customs brokers. Pursuant to the revised section 19 U.S.C. 1641, monetary penalties may be assessed against brokers or parties acting as brokers. The language of the new statute does not enumerate specific penalty amounts to be assessed for various transgressions. The following document attempts to define that conduct which is to be proscribed and to suggest penalty amounts to be assessed for such violations.

It should be noted that penalties for a violation or violations of the statute are limited to amounts not to exceed \$30,000. **EXCEPTION:** Penalties incurred under section 1641(b)(6) are limited to \$10,000 for each violation. Aggregate penalties under this section are limited to \$30,000.

NOTE: Unless otherwise noted, the assesment of penalties is an alternative sanction to revocation or suspension of the broker's license. The imposition of these penalties is always done at the discretion of the district director.

Section 1641(b)(6).—Conducting customs business without a license.

A. Customs business, as defined in subsection 1641(a), includes all transactions relating to entry and admissibility of merchandise including classification and valuation and the payment of duties, taxes or other charges assessed or collected by Customs. It also includes transactions relating to refund, rebate or drawback. Customs business does not relate to those transactions relating solely to the exportation or transportation of goods.

B. This section provides for a monetary penalty not to exceed \$10,000 to be imposed against "Any person who intentionally transacts customs business, other than solely on the behalf of that person, without holding a valid customs broker's license granted to that person under this subsection * * *". Separate penalties, each not exceeding \$10,000 to a maximum aggregate of \$30,000, may be imposed for each transaction occurring in violation of this provision. The \$10,000 penalty also may be imposed for each violation of any other provision of section 1641.

C. Penalty amounts to be imposed for transacting customs business without a license are as follows:

1. No penalty action when importation is conducted on behalf of a family member. For purposes of this subsection "family member" is defined as a parent, child, spouse, sibling, grandparent, or grandchild.

2. No penalty action when *all* of the following are evident:

- a. First violation
- b. One time transaction

- c. Non-commercial in nature (goods for personal use of another person other than a family member—not for resale)
- d. Violator not remunerated for his action

NOTE: A letter of warning should be issued indicating that further like conduct will result in penalty action

3. \$250 penalty for:

- a. Each repeat violation made under conditions listed above under subsection (2), or
- b. First violation when transaction is non-commercial in nature but is conducted on behalf of any business entity (including associations, corporations and partnerships), for example:
 - i. an importation of office supplies made on behalf of a business entity is a non-commercial importation that would fall under this category of violation because the supplies would be used by business entity and are not for resale
 - ii. an importation of raw material or parts of merchandise that is to be manufactured, refined, or assembled here before resale would not be a non-commercial entry because the merchandise eventually will be resold, albeit in another form than that which it was entered
- c. First violation where the importation is commercial in nature (i.e., imported merchandise is for resale), or where the violator is compensated for his action

4. \$1,000 penalty for each repeat violation involving:

- a. Commercial importation
- b. Non-commercial importation made on behalf of a business entity
- c. Non-commercial importation for which compensation is received by the violator

5. \$10,000 penalty when:

- a. Violator falsely holds himself out as being a licensed customs broker
- b. A continuing course of conduct can be shown (determined by frequency of violations and/or number of entries involved) which would indicate that the violator is entering merchandise for others on a regular commercial basis

e.g., if the violator has incurred numerous penalties under subsections (2) and (3) above, but the smaller penalties have had no deterrent effect, the \$10,000 penalty under this subsection should be assessed in an action separate from those smaller penalties

D. IMPORTANT: As a general rule, a separate penalty should not be imposed for each unlawful Customs business transaction if numerous transactions occur contemporaneously. For example:

- 1. If an unlicensed individual files six commercial entries at one time, that should be treated as one violation. It should not be treat-

ed as six violations because the entries were presented contemporaneously.

2. However, if evidence exists to indicate that an unlicensed individual is filing numerous entries or is conducting numerous contemporaneous transactions so as to avoid multiple penalties, then the deciding official may, at his discretion, choose to impose multiple penalties.

3. If Customs discovers that an individual has conducted Customs business without a license on numerous occasions, but such individual acted without knowledge of the prohibition on such conduct, those numerous transactions should be treated as one violation for purposes of imposition of any penalty.

E. In no case involving a first violation should mitigation from the imposition of the penalty be granted, unless extraordinary mitigating circumstances can be shown.

F. Mitigation may be granted from penalties arising from a second or subsequent violation. For example, a significant lapse of time between violations would be considered a mitigating factor in the disposition of such penalties.

G. Intent to violate the law is not an element of this violation. Reference to "intentionally transacts customs business" in subsection 1641(b)(6) relates to the intentional transaction of the business itself, not to any intentional attempt to violate the terms of the statute.

Section 1641 (d)(1)(A).—Making a false or misleading statement or an omission as to material fact in any application for a license or a permit.

A. If the license would not have been issued but for the false statement, the proper sanction would be suspension or revocation of the license. If the false or misleading statement would not have absolutely resulted in the denial, revocation or suspension of a license, then penalty sanctions are proper.

B. Material facts include but are not limited to:

1. Facts as to identify.
2. Facts as to citizenship status of an individual.
3. Facts as to moral character of an individual which relate to his fitness to conduct Customs business.
4. The organization of any corporation, association, or partnership.
5. The status of the license of a license holder who is a corporate officer or partner.

C. \$5,000 penalty for each false statement.

D. Mitigation may be granted in these cases.

Section 1641(d)(1)(B).—Conviction of a broker of certain felonies or misdemeanors subsequent to filing an application for a license.

A. As a general rule, license revocation is the standard sanction for these violations. If monetary penalties are assessed, the following criteria should be used.

B. Unlawful conduct must relate to:

1. Importation or exportation of merchandise.
2. Conduct of customs business (this shall include violations relating to taxes and duties and documents required to be filed with regard to such taxes and duties).

3. For example, relevant convictions would be:

- a. 18 U.S.C. 1001—making a false statement to Customs or any other agency with regard to any relevant transaction
- b. 18 U.S.C. 545—unlawful importation of merchandise
- c. 18 U.S.C. 542—unlawful importation by means of a fraudulent act or omission
- d. 22 U.S.C. 2778—illegal exportation of munitions

C. Monetary penalties may not be imposed in connection with convictions relating to conduct described in subsection 1641(d)(1)(B)(iii). Either suspension or revocation is the appropriate penalty for these infractions.

D. \$15,000 penalty for each misdemeanor conviction.

E. \$30,000 penalty for each felony conviction.

F. Any sanction to be imposed under this subsection must be approved by Headquarters.

Section 1641(d)(1)(C).—Violation of any law enforced by the Customs Service or the rules or regulations issued under any such provision.

A. As a general rule, no penalty will be issued under this subsection when a personal penalty (*not* a claim for liquidated damages) against the violator is provided for by the other law being enforced by Customs.

EXCEPTION: If the violation the other law enforced by Customs is intentional in nature, then penalties may be assessed under this subsection in addition to any sanctions provided by that other law.

e.g., a broker intentionally falsifies entry documents and presents them to Customs. He is found to have committed an intentional fraudulent violation under 19 U.S.C. 1592. He shall be liable for sanctions under this subsection in addition to any 1592 penalties. Had the 1592 violation been found to have resulted because of gross negligence or negligence, penalties pursuant to this subsection should not be imposed.

B. A penalty shall be imposed in situations where the other law violated only moves against property or the violator has demon-

strated a continuing course of illegal conduct or evidence exists which indicates repeated violations of other statutes or regulations.

C. If the other law violated moves only against property, the violator shall incur a monetary penalty equal to the domestic value of such property or \$30,000, whichever is less.

e.g., violations of 22 U.S.C. 401 for unlawful exportation of merchandise result in seizure and forfeiture of the violative merchandise. There are no penalty provisions which Customs enforces against parties responsible for the seizable offense. If brokers are recalcitrant and are constantly responsible for offenses which result in seizure of merchandise, a penalty equal to the domestic value of such merchandise (in no case to exceed \$30,000) should be imposed.

D. If the evidence supports the finding of repeated statutory or regulatory violations or the intentional violation of any statute or regulation, penalties in addition to those provided for by the statute or regulation violated should be imposed as follows:

1. First violation involving a finding of a pattern of violations or a finding of an intentional violation—\$1,000.
2. Second violation—\$5,000 penalty.
3. Third and subsequent violations—\$10,000.

E. Mitigation based on negligence standards is appropriate in these types of cases.

F. Examples of violations for which penalties described under subpart D are appropriate.

1. A broker continually submits incomplete entry summaries resulting in a high rejection rate. He incurs numerous claims for liquidated damages for late filing of entry summaries. Rather than revoke his ID privileges and place him on a cash only basis, the option is available to assess monetary penalties pursuant to this section for his continuing course of conduct in violating the Customs Regulations.

2. A broker consistently files entries claiming duty free entry of merchandise under GSP. He does not submit Forms A at the time of filing of the entry summary, relying on his bond assuring production of missing documents. The broker continually fails to submit the forms, resulting in liquidation of the entries as dutiable. Significant delay occurs between the filing of the original entry, payment of duties and liquidation. This consistent failure to comply with the Regulations with regard to filing of missing documents would warrant imposition of penalties under this subsection.

Section 1641(d)(1)(D).—Counseling, commanding, inducing, procuring or knowingly aiding and abetting violations by any other person of any law enforced by the Customs Service.

A. If the law violated by another moves only against property, a monetary penalty equal to the domestic value of such property or

\$30,000, whichever is less, may be imposed against the broker who counsels, commands, aids or abets such violation.

B. If the law violated provides for only a personal penalty against the actual violator, a penalty may be imposed against the broker in an amount equal to that assessed against the violator, but in no case can the penalty exceed \$30,000.

C. All penalties assessed under this subsection may be imposed in addition to any penalties that may be assessed against the broker under the provisions of title 19, United States Code, section 1595a(b).

D. Examples of violations of this subsection:

1. A broker counsels a client that certain gemstones are absolutely free of duty and need not be declared upon entry into the United States. The client arrives in the United States and fails to declare a quantity of gemstones worth \$45,000. A penalty of \$30,000 may be imposed against the broker for such counseling. The client would incur a personal penalty of \$45,000 under the provisions of title 19, United States Code, section 1497, but the penalty against the broker cannot exceed \$30,000.

2. A client imports \$15,000 worth of merchandise by vessel. The merchandise is unladen at the wharf but Customs has not appraised or released it. The broker informs the client that the merchandise can be moved and delivered to the consignee. The broker assures his client that he will handle all the necessary paperwork. The merchandise is moved from the wharf. The broker is subject to a \$15,000 penalty for counseling and inducing his client to violate the provisions of title 19, United States Code, section 1448.

E. All penalties imposed under this subsection are subject to mitigation.

Section 1641(d)(1)(E).—Knowingly employing or continuing to employ any person who has been convicted of a felony, without written approval of such employment from the Secretary of the Treasury.

Ordinarily revocation or suspension of the license would be the appropriate remedy for this violation. Should such sanctions not be pursued then the following penalties should be assessed:

A. \$25,000 penalty for knowingly employing any convicted felon without seeking approval for employment.

B. \$30,000 penalty for knowingly employing any convicted felon and continuing to employ same after approval has been denied.

C. \$5,000 penalty for knowingly employing any convicted felon and failing to make application with the Secretary approving such employment within 30 days of the date of discovery of the felony conviction.

D. Example: If a broker unknowingly employs a convicted felon and 1 year after employment discovers the existence of such a conviction, the following actions would dictate imposition of penalties:

1. He has 30 days to seek approval of the Secretary for such employment. If he seeks the approval within such time, no penalty action would lie.

2. If he seeks approval at some time after 30 days from the date of discovery, a \$5,000 penalty would lie.

3. If he does not seek approval until after Customs becomes aware of the violation, a \$25,000 penalty would lie.

4. If he seeks approval but is denied, and continues to employ the convicted felon, a \$30,000 penalty would lie.

E. Mitigation will only be permitted from the \$5,000 penalty.

F. The age of the conviction will not be a factor which would obviate the imposition of any penalty. It will be a factor when considering the grant of approval of employment that would be made by the Secretary.

G. Violation of this section will be *prima facie* evidence of a violation of section 1641(b)(4) relating to responsible supervision of customs business.

Section 1641(d)(1)(F).—In the course of customs business, with intent to defraud, knowingly deceiving, misleading or threatening any client or prospective client.

Ordinarily, revocation or suspension of the license would be the appropriate remedy for this violation. Should such sanctions not be pursued then the following guidelines with regard to assessment of penalties should be followed:

A. An unsubstantiated accusation by a client is inadequate reason to assess any penalty under this section.

B. A \$30,000 penalty should be imposed for any violation of this subsection.

C. Inasmuch as evidence of intent must be shown before a penalty can be imposed, no mitigation should be permitted if a violation is found to lie. A petition for mitigation could be entertained only on the issue of whether such violation did, in fact, occur.

Section 1641(b)(5).—The failure of a customs broker that is licensed as a corporation, association or partnership to have, for any continuous period of 120 days, at least one officer of the corporation or association or one member of the partnership validly licensed.

A. IMPORTANT: Violation of this section results in the revocation of the broker's license by operation of law.

B. A penalty of \$10,000 pursuant to section 1641(b)(6) should be imposed because the revocation by operation of law results in the broker conducting Customs business without a license. No penalty liability would be incurred specifically under section 1641(b)(5).

Section 1641(c)(3).—Failure of a customs broker granted a permit to conduct business in a certain district to employ, for a continuous period of 180 days, at least one individual who is licensed within the district or region.

A. **IMPORTANT:** Violation of this section results in the revocation of the permit by operation of law.

B. The same parameters should be followed for imposition of penalties under this section as those established under section 1641(b)(5).

C. **IMPORTANT:** The new law as it pertains to permits (sections 1641(c)(1)(B) and 1641(c)(2)) does not take effect until October 12, 1987. Penalties or sanctions for violation of this section can only be issued if the violation occurs subsequent to that effective date.

Section 1641(b)(4).—Failure of a licensed broker to exercise responsible supervision and control over the business it conducts.

A. Standards of responsible supervision and control shall be issued by Commissioner of Customs. Regulatory authority to set such standards is provided by new section 1641(f).

B. The following penalty amounts shall be assessed against brokers who fail to exercise responsible supervision and control over business conducted at a district level:

1. A penalty of \$1,000 against any broker employing an individual who violates any provision of section 1641. Such violation shall be *prima facie* evidence of a failure to exercise responsible control.

2. A penalty of \$5,000 against any broker who, when requested, is unable to produce documents relating to specific Customs business.

3. A penalty of \$5,000 against any broker who is unable to satisfy the deciding Customs official that he has a working knowledge of any operation for which he is licensed to do business. Failure to have such working knowledge shall be *prima facie* evidence of a lack of responsible supervision and control. Such working knowledge must include:

a. A working knowledge of all automated systems in use in the district including ABI, where applicable

b. A knowledge of the cash flow procedures in each district of operation

c. Retention of all surety bonds in the proper form and in sufficient dollar amounts

d. Continuous monitoring to ensure timely payment of all obligations including duties, taxes and refunds

e. Knowledge of backgrounds and performance of all employed personnel in the region (failure to perform this function could result in penalties assessed under 1641(d)(1)(E))

f. Knowledge of filing systems and document record storage in each district

g. Knowledge of any other ancillary operation of which the district director has reason to inquire

4. A penalty of \$10,000 against any broker who is found to have failed to maintain satisfactory accounting records or records of documents filed with Customs on any matter.

C. Penalties issued in accordance with subsection (B) are subject to mitigation through use of a standard of culpability based on negligence.

D. The following factors shall be indicative of a lack of supervision or lack of working knowledge of Customs procedures (the list is not conclusive):

1. A high rate of entry rejections.
2. A high rate of late filing liquidated damages cases.
3. A high number of missing documents cases.
4. An inordinate number of entries for which free entry is claimed, but no documentation supporting such claim is submitted, resulting in liquidation of the entries as dutiable.
5. Inability to assist or failure to cooperate with an audit, including failure to provide all records and any other necessary information to assist auditors.
6. Incurrence of liquidated damages claims which exceed the amount of any term bonds.
7. Evidence to indicate that timely duty refunds to clients are not made and adequate records of same are not kept.
8. Employing a licensed individual for a minimal number of days each 120 or 180-day period (see, sections 1641(b)(5) and 1641(c)(3)) so as to avoid violation of the statute.

a. For purposes of imposition of penalties under this subsection, a minimal number of days shall be 10 working days per each 120-day period or 15 working days per each 180-day period

b. It shall be presumed that temporary employment of such a licensed individual is undertaken solely to avoid revocation of a license or permit. Such minimal employment shall be *prima facie* evidence of lack of supervision

E. The provisions of new section 1641(c)(2) do not take effect until 3 years from the date of enactment of the statute. As such, no penalties imposed in accordance with the preceding subsection (D) of this outline can be assessed until that time.

Monetary penalties are not appropriate for any violation involving the mere failure to file the triennial report as required by new section 1641(g); however, failure to file such a document could result in revocation or suspension of the broker's license.

Notwithstanding any current delegation of authority, authority to impose penalties under 19 U.S.C. 1641 shall be retained by the Commissioner until formal delegation occurs.

Dated: August 29, 1986.

MARVIN M. AMERNICK,
Director,
Regulations Control & Disclosure Law Division.

[Published in the Federal Register, September 10, 1986 (51 FR 32208)]

(T.D. 86-164)

FOREIGN CURRENCIES
DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
August 1, 1986.....	\$.007380
Israel shekel:	
August 1, 1986.....	N/A
South Korean won:	
August 1, 1986.....	.001126
Taiwan N.T. dollar:	
August 1, 1986.....	.026274

(LIQ-03-01 S:COM CIE)

Dated: August 1, 1986.

ANGELA DeGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-165)

FOREIGN CURRENCIES
DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:

August 4, 1986	\$.007413
August 5, 1986 .....	.007345
August 6, 1986 .....	.007396
August 7, 1986007438
August 8, 1986007413

Israel shekel:

August 4-8, 1986	N/A
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South Korean won:

August 4-5, 1986001126
August 6, 1986001125
August 7, 1986001126
August 8, 1986 .....	.001127

Taiwan N.T. dollar:

August 4, 1986 .....	.026330
August 5, 1986 .....	.026413
August 6, 1986 .....	.026455
August 7, 1986 .....	.026490
August 8, 1986 .....	.026490

(LIQ-03-01 S:COM CIE)

Dated: August 8, 1986.

ANGELA DeGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-166)

FOREIGN CURRENCIES
 DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:

August 11, 1986	\$.007452
August 12, 1986 .....	.007377
August 13, 1986 .....	.007410
August 14, 1986 .....	.007429
August 15, 1986 .....	.007418

Israel shekel:	
August 11-15, 1986	N/A
South Korea won:	
August 11, 1986 .....	.001126
August 12-13, 1986 .....	.001127
August 14-15, 1986 .....	.001128
Taiwan N.T. dollar:	
August 11, 1986 .....	.026638
August 12, 1986 .....	.026674
August 13, 1986 .....	.026709
August 14, 1986 .....	.026745
August 15, 1986 .....	.026781

(LIQ-03-01 S:COM CIE)

Dated: August 15, 1986.

ANGELA DeGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-167)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
August 18, 1986	\$.007402
August 19, 1986 .....	.007443
August 20, 1986 .....	.007452
August 21, 1986 .....	.007468
August 22, 1986 .....	.007463
Israel shekel:	
August 18-22, 1986	N/A
South Korea won:	
August 18-19, 1986 .....	.001128
August 20, 1986 .....	.001129
August 21-22, 1986 .....	.001130
Taiwan N.T. dollar:	
August 18, 1986 .....	.026853
August 19, 1986 .....	.026874

August 20, 1986 .....	.026896
August 21, 1986 .....	.026874
August 22, 1986 .....	.026940

(LIQ-03-01 S:COM CIE)

Dated: August 22, 1986.

ANGELA DeGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-168)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
August 25, 1986	\$.007454
August 26, 1986 .....	.007418
August 27, 1986 .....	.007424
August 28, 1986 .....	.007465
August 29, 1986 .....	.007463
Israel shekel:	
August 25-29, 1986	N/A
South Korea won:	
August 25-27, 1986 .....	.001131
August 28-29, 1986 .....	.001130
Taiwan N.T. dollar:	
August 25, 1986 .....	.026976
August 26, 1986 .....	.026991
August 27, 1986 .....	.026998
August 28, 1986 .....	.027005
August 29, 1986 .....	.027012

(LIQ-03-01 S:COM CIE)

Dated: August 29, 1986.

ANGELA DeGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-169)

FOREIGN CURRENCIES
VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
August 1, 1986	\$.60520
China, P.R. renminbi yuan:	
August 1, 1986 .....	.269331
Japan yen:	
August 1, 1986 .....	.006500
Switzerland franc:	
August 1, 1986 .....	.598623

(LIQ-03-01 S.COM CIE)

Dated: August 1, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-170)

FOREIGN CURRENCIES
VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
August 4, 1986	\$.60140
August 5, 1986 .....	.61600
August 6, 1986 .....	.62000
August 7, 1986 .....	.61060
August 8, 1986 .....	.60840
Austria schilling:	
August 7, 1986 .....	.068705
August 8, 1986 .....	.068729
China, P.R. renminbi yuan:	
August 4-8, 1986 .....	.269331
Germany deutsche mark:	
August 7, 1986 .....	.483793
August 8, 1986 .....	.483092
Italy lira:	
August 7-8, 1986 .....	.000702
Japan yen:	
August 4, 1986 .....	.006494
August 5, 1986 .....	.006454
August 6, 1986 .....	.006477
August 7, 1986 .....	.006502
August 8, 1986 .....	.006487
Netherlands guilder:	
August 7, 1986 .....	.429185
August 8, 1986 .....	.428669
New Zealand dollar:	
August 8, 1986 .....	.50650
Switzerland franc:	
August 4, 1986 .....	.595948
August 5, 1986 .....	.592593
August 6, 1986 .....	.595948
August 7, 1986 .....	.600060
August 8, 1986 .....	.599161
United Kingdom pound:	
August 4, 1986 .....	.14700

(LIQ-03-01 S:COM CIE)

Dated: August 8, 1986.

ANGELA DeGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-171)

FOREIGN CURRENCIES
VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
August 11, 1986	\$.60680
August 12, 1986 .....	.60830
August 13, 1986 .....	.61360
August 14, 1986 .....	.62130
Austria schilling:	
August 11, 1986 .....	.069013
August 13, 1986 .....	.068681
August 14, 1986 .....	.068918
August 15, 1986 .....	.068966
China, P.R. renminbi yen:	
August 11-15, 1986 .....	.269331
Germany deutsche mark:	
August 11, 1986 .....	.485201
August 13, 1986 .....	.482975
August 14, 1986 .....	.484848
August 15, 1986 .....	.484731
Italy lira:	
August 11, 1986 .....	.000706
August 13, 1986 .....	.000702
August 14-15, 1986 .....	.000704
Japan yen:	
August 11, 1986 .....	.006503
August 12, 1986 .....	.006464
August 13, 1986 .....	.006481
August 14, 1986 .....	.006505
August 15, 1986 .....	.006485
Netherlands guilder:	
August 11, 1986 .....	.430849
August 13, 1986 .....	.428541
August 14, 1986 .....	.430256
August 15, 1986 .....	.430293

New Zealand dollar:

August 11, 1986 .....	.49500
August 12, 1986 .....	.49550
August 13, 1986 .....	.50150
August 14, 1986 .....	.50150
August 15, 1986 .....	.49500

Switzerland franc:

August 11, 1986 .....	.604047
August 12, 1986 .....	.595770
August 13, 1986 .....	.598516
August 14, 1986 .....	.601866
August 15, 1986 .....	.601142

(LIQ-03-01 S:COM CIE)

Dated: August 15, 1986.

ANGELA DeGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-172)

FOREIGN CURRENCIES
 VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:

August 20, 1986	\$.61180
August 21, 1986 .....	.61150
August 22, 1986 .....	.60700

Austria schilling:

August 18, 1986 .....	.068634
August 19, 1986 .....	.069109
August 20, 1986 .....	.069369
August 21, 1986 .....	.069638
August 22, 1986 .....	.069541

Belgium franc:	
August 21, 1986 .....	.023629
August 22, 1986 .....	.023629
China, P.R. renminbi yuan:	
August 18-22, 1986 .....	.269331
Germany deutsche mark:	
August 18, 1986 .....	.482859
August 19, 1986 .....	.485791
August 20, 1986 .....	.488162
August 21, 1986 .....	.489596
August 22, 1986 .....	.489117
Italy lira:	
August 19, 1986 .....	.000706
August 20-22, 1986 .....	.000709
Japan yen:	
August 18, 1986 .....	.006485
August 19, 1986 .....	.006515
August 20, 1986 .....	.006519
August 21, 1986 .....	.006525
August 22, 1986 .....	.006517
Netherlands guilder:	
August 18, 1986 .....	.428633
August 19, 1986 .....	.431034
August 20, 1986 .....	.433088
August 21, 1986 .....	.434122
August 22, 1986 .....	.433745
New Zealand dollar:	
August 18, 1986 .....	.49850
August 19, 1986 .....	.50500
August 20, 1986 .....	.50100
August 21, 1986 .....	.48550
August 22, 1986 .....	.48750
Switzerland franc:	
August 18, 1986 .....	.596659
August 19, 1986 .....	.602410
August 20, 1986 .....	.606980
August 21, 1986 .....	.607718
August 22, 1986 .....	.605877

(LIQ-03-01 S.COM CIE)

Dated: August 22, 1986.

ANGELA DeGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-173)

FOREIGN CURRENCIES
VARIANCES FROM QUARTERLY RATE

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-132 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Australia dollar:	
August 25, 1986	\$.60520
August 26, 1986 .....	.60960
August 27, 1986 .....	.60900
August 28, 1986 .....	.60850
August 29, 1986 .....	.60900
Austria schilling:	
August 25, 1986 .....	.069589
August 26, 1986 .....	.069348
August 27, 1986 .....	.069061
August 28, 1986 .....	.069348
August 29, 1986 .....	.069808
Belgium franc:	
August 25, 1986 .....	.023646
August 27, 1986 .....	.023602
August 29, 1986 .....	.023736
China, P.R. renminbi yuan:	
August 25-29, 1986 .....	.269331
Denmark krone:	
August 29, 1986 .....	.129870
Germany deutsche mark:	
August 25, 1986 .....	.489596
August 26, 1986 .....	.487805
August 27, 1986 .....	.488878
August 28, 1986 .....	.487805
August 29, 1986 .....	.491280
Italy lira:	
August 25, 1986 .....	.000710
August 26-27, 1986 .....	.000708
August 28, 1986 .....	.000707
August 29, 1986 .....	.000712

Japan yen:	
August 25, 1986 .....	.006500
August 26, 1986 .....	.006454
August 27, 1986 .....	.006465
August 29, 1986 .....	.006470
Netherlands guilder:	
August 25, 1986 .....	.433651
August 26, 1986 .....	.432208
August 27, 1986 .....	.433276
August 28, 1986 .....	.432339
August 29, 1986 .....	.435540
New Zealand dollar:	
August 25, 1986 .....	.48550
August 26, 1986 .....	.49000
August 27, 1986 .....	.49450
August 28, 1986 .....	.49500
August 29, 1986 .....	.48650
Switzerland franc:	
August 25, 1986 .....	.607718
August 26, 1986 .....	.605327
August 27, 1986 .....	.607718
August 28, 1986 .....	.605510
August 29, 1986 .....	.609385

(LIQ-03-01 S:COM CIE)

Dated: August 29, 1986.

ANGELA DeGAETANO,
Chief,
Customs Information Exchange.

19 CFR Part 6

(T.D. 86-174)

CUSTOMS REGULATIONS AMENDMENT CONCERNING ACCESS TO CUSTOMS
 SECURITY AREAS AT AIRPORTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to require the use and display of a Customs approved identification card, strip, or seal on existing identification cards worn by employees at airports accommodating international air commerce. The changes are necessitated by recent terrorist incidents at foreign airports, and in an effort to prevent similar incidents from occurring at U.S.

airports accommodating international arrivals and departures. All Federal, and uniformed State and local law enforcement personnel are excepted from the requirement. The additional identification is required for all non-exempt persons located at, operating out of, or employed by, affected airports, who require access to Customs security areas in order to perform functions associated with their employment. The amendment also requires that an authorized official of the employer attest, in writing, that a background check of employment history and references has been conducted on their affected employees.

EFFECTIVE DATE: October 14, 1986.

FOR FURTHER INFORMATION CONTACT: Operational Aspects: Charles P. Bartoldus (202-566-2140). Legal Aspects: Ellen McClain (202-566-2482).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Various provisions of the Tariff Act of 1930, as amended (19 U.S.C. 1202 *et seq.*), which are made applicable to aircraft by 19 U.S.C. 1644, (49 U.S.C. App. 1509), and § 6.10, Customs Regulations (19 CFR 6.10), provide the statutory authority for Customs officers to control the entry and clearance of aircraft arriving in the U.S. from foreign countries and the inspection of the crew, passengers, baggage, stores, and cargo carried aboard those aircraft. Section 1109 of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. 1509), authorizes the Secretary of Treasury to designate airports as ports of entry for civil air navigation. Section 582, Tariff Act of 1930, as amended (19 U.S.C. 1582), authorizes the Secretary of the Treasury to prescribe regulations for the detention and search of persons and baggage. These regulations are set forth in Parts 6 and 162, Customs Regulations (19 CFR Parts 6 and 162). Implicit in the search and inspection authority and the right to designate airports is the right to maintain a controlled and secure Customs area which facilitates and insures the integrity of the authorized search and inspection.

Customs found it necessary to improve integrity and security in authorized inspection areas, due in large measure to the recent sharp increases in threats to airport security posed by terrorist organizations. Existing Part 6, Customs Regulations, was inadequate for controlling access to the Customs security areas to the extent necessary. The arrival of an aircraft from abroad necessitates the services of numerous persons representing various specialties, such as ground crews, refueling personnel, baggage handlers, and food service personnel, among others. While all of these persons may have legitimate business associated with the arrival of an international flight, Customs needed a method by which access to the aircraft and inspection areas could be restricted, as well as some assur-

ance that the service personnel themselves had been found trustworthy by their employers. While the Federal Aviation Administration (FAA) has general responsibility for security at airports, Customs determined that it was necessary to provide Customs with the needed authority and procedures to achieve these goals at the areas under the Customs jurisdiction.

Accordingly, Customs amended Part 6, Customs Regulations, on an interim basis by publication of T.D. 86-12 in the Federal Register on February 3, 1986 (51 FR 4161). The purpose of the amendment was to establish an identification system for all employees whose duties require access to Customs security areas at airports handling international air commerce, with the exception of Federal, and uniformed State, and local law enforcement personnel. Because of terrorist incidents at foreign airports, threats of violence at U.S. airports, and in an effort to improve the security of these areas by restricting access to authorized employees, Customs required that affected employees apply for a Customs approved identification card, or a strip or seal to be affixed to existing identification cards once an authorized official of the employer attested that background checks of employment history of the affected employees had been conducted. Since March 5, 1986, when the interim regulations became effective, Customs has issued the identification card, strip or seal once satisfied that the presence of the employee would neither endanger the revenue nor threaten the security of the entire security area (which may include the arriving airplane, ramp area, cargo area, and Customs baggage and passenger inspection facilities).

The requirement for a background investigation of employees was only for employees hired after November 1, 1984. For all employees hired before that date, the authorized official of the employer needed only attest to the fact that the employee was employed before November 1, 1984, and was considered trustworthy.

Further, the interim amendment provided identification of a "Customs security area" within which the previously described procedures would be enforced. This area could include the deplaning and ramp areas, as defined by the district director of Customs, as well as the baggage and passenger inspection areas. These areas are posted, to the extent possible, once designated. In airports with areas dedicated only to international arrivals, the posted areas are restricted at all times. In airports in which international and domestic flights share arrival facilities, the restriction times are posted to the extent they are identifiable.

The February 3, 1986, Federal Register notice solicited public comments on the new requirements. The comments received have been taken into consideration in formulating the final rule and are discussed in this document.

ANALYSIS OF COMMENTS

Fourteen comments were received in response to publication of the interim regulations. Several commenters, including associations representing the airline industry and airport operators, took exception to the November 1, 1984, cut-off date for conducting background investigation on persons requiring access to the Customs security area. Concern was expressed that the date should be consistent with the November 1, 1985, date which the FAA utilizes in administering related requirements. We believe that this comment has merit and have changed the date after which background checks must be conducted by employers to November 1, 1985.

Other commenters stated that the new requirements are merely duplicative of FAA security regulations. The FAA has the responsibility for overall security at U.S. airports. Customs has the responsibility to safely and efficiently process international passengers, baggage, and cargo. The new requirements merely enhance the security of high risk areas and, in that sense, act to enhance the FAA efforts. They are not duplicative of the FAA requirements and have been endorsed by that agency.

A point raised by several commenters was that the need for proceeding on an emergency interim basis was never adequately justified. At the time the regulations were prepared, we were unable to make specific references to threats received. Events surrounding the threats remain classified. However, it can be stated that specific threats were received that passengers arriving at U.S. airports, on foreign flights, would be the targets of terrorist actions. The terrorist events were to take place while passengers were being processed in or exiting from Customs areas. In coordinating security measures at several airports, it became apparent that immediate tighter controls on access to Customs areas were necessary. The interim amendment to the regulations was designed to meet these needs without undue and possibly dangerous delay.

One commenter asked for exception from the formal application process for law enforcement personnel. We have revised the regulations to reflect that law enforcement personnel need not make application nor submit to background checks for security area access.

Several commenters were concerned that the processing of part-time employees would be cumbersome. Customs representatives have discussed this with industry representatives and have determined that the concern was premature. Customs officers implementing the program are cognizant of the industry concern on this subject and are working locally to avoid over-burdening the industry. Therefore, no change in the regulation is warranted on this subject.

One commenter stated that he had been informed that the new requirements apply only to large airports. This is not the case. The

new requirements apply to all airports at which international flights arrive or depart.

One commenter urged severe penalties for violations of the new security requirements. At this time, Customs believes that existing penalty provisions are sufficient to administer these regulations.

After consideration of all the comments received, and following further review of the matter, it has been determined to adopt the interim regulations with the minor modifications discussed and several editorial changes.

E.O. 12291 AND REGULATORY FLEXIBILITY ACT

Because the amendment does not meet the criteria for a "major rule" within the meaning of § 1(b) of E.O. 12291, Customs has not prepared a regulatory impact analysis.

It is certified under § 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the regulations will not have a significant economic impact on a substantial number of small entities.

PAPERWORK REDUCTION ACT

The regulations are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501). Accordingly, they were submitted to the Office of Management and Budget, approved, and assigned control number 1515-0152.

LIST OF SUBJECTS IN 19 CFR PART 6

Air carriers, Air transportation, Aircraft, Airports.

DRAFTING INFORMATION

The principal author of this document was Larry L. Burton, Regulations Control Branch, Customs Headquarters. However, personnel from other offices participated in its developments.

AMENDMENT TO THE REGULATIONS

Part 6, Customs Regulations (19 CFR Part 6), is amended as set forth below:

PART 6—AIR COMMERCE REGULATIONS

1. The authority citation for Part 6 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (Gen Hdnote 11), 1624, 1644, 49 U.S.C. App. 1474, 1509.

2. Part 6 is amended by adding a new § 6.12a, to read as follows:

§ 6.12a. Access to Customs Security Areas.

(a) For the purposes of this section, the term "Customs security area" means the federal inspection services area (as provided for by § 6.12(e) of this part), designated for processing passengers, crew, their baggage and effects arriving from foreign countries, as well as the aircraft deplaning and ramp areas and other restricted areas

designated by the district director of Customs. These areas will be posted as restricted to the extent possible, and are established for the purpose of prohibiting unauthorized entries or contact with persons or objects.

(b) With the exception of all Federal, and uniformed State and local law enforcement personnel, all persons located at, operating out of, or employed by any airport accommodating international air commerce, or its tenants or contractors, including air carriers, who have unescorted access to the Customs security areas must openly display or produce upon demand, a Customs approved identification card, or strip or seal to be issued and affixed by Customs to existing airport identification cards. The approved identification card, strip or seal, shall be in the possession of the person in whose name it is issued at all times when the person is in the Customs security areas.

(c) An application for an approved identification card, strip or seal as required by this section, shall be filed by the applicant with the district director on Customs Form 3078. This requirement applies to all employees, regardless of the length of their employment. For employees hired on or after November 1, 1985, an authorized official of the employer shall attest in writing that a background check has been conducted on the applicant, to the extent allowable by law. The background check shall include, at a minimum, references and employment history, to the extent necessary to verify representations made by the applicant relating to employment in the preceding 5 years. For any employee hired before November 1, 1985, the authorized official of the employer need only attest to the fact that the employee was hired before that date. The authorized official of the employer shall attest that to the best of his knowledge, the applicant meets the conditions necessary to perform functions associated with employment in the Customs security area. The fingerprints of the applicant may be required on Standard Form 87 at the time of the filing of the approved application. Proof of citizenship or authorized residency, and a photograph may also be required. In addition, the application may be investigated by Customs and a report prepared concerning the character of the applicant. Records of background investigations conducted by employers must be retained and made available upon request by the district director for a period of 1 year following cessation of employment by affected employees.

(d) Law enforcement officers and other Federal, State, or local officials requiring access to the Customs security area need only request from the district director the issuance of an approved identification card with strip or seal affixed thereto. They need not make application nor submit to background checks for security area access.

(e)(1) An approved identification card, strip, or seal shall not be issued to any person whose employment, if necessitating access to

the Customs security areas will, in the judgment of the district director, endanger the revenue or the security of the areas. Grounds for denial of access shall include, but are not limited to:

(i) Any cause which would justify suspension or revocation of the identification card under the provisions of paragraph (j) of this section; or

(ii) Evidence of a pending or past investigation which establishes criminal, or dishonest conduct, or a verified record of such conduct.

(2)(i) The district director shall give written notification to any person whose application for access to the Customs security areas has been denied, fully stating the reasons for denial and setting forth specific appeal procedures. The employer shall be notified in writing that the applicant has been denied access to the area and that detailed reasons for denial have been furnished to the applicant. Specific reasons for denial shall not be furnished directly to the employer.

(ii) The denial will be final unless the applicant files with the district director a written notice of appeal. The applicant's written notice must be filed within 10 calendar days following receipt of the notice of denial. The notice of appeal shall be filed in duplicate, and shall set forth the response of the applicant to the statement of the district director. The district director shall render his decision on the appeal to the applicant within 30 calendar days.

(iii) If the district director denies the application on appeal, the applicant may file a further written notice of appeal to the Commissioner of Customs within 10 calendar days of receipt of the district director's decision on the appeal. The further notice of appeal shall be filed in duplicate, and shall set forth the response of the applicant to the district director's decision. The Commissioner or his designee shall review the appeal, and render his decision, in writing. This final decision shall be transmitted to the district director and served by him on the applicant.

(f) An employee may obtain a new identification card, strip, or seal from the district director in the following circumstances, without completing a new application:

(1) A change in employee name or address;

(2) A change in the name or ownership of his employing company;

(3) A change in employer or airport authority identification card format; or

(4) Loss or theft of the identification card, strip, or seal.

(g) The identification strip or seal shall be removed from employee identification cards by the district director when, for security reasons, it is necessary to change the nature of the identification.

(h) The loss or theft of an identification card, with strip or seal affixed, shall be promptly reported, in writing, by the employee to the district director, and may be replaced as provided in paragraph (f) of this section.

(i) If an approved identification card is presented by a person other than the one to whom it was issued, the identification strip or seal shall be removed from the identification card by the district director and destroyed.

(j)(1) An approved identification card, strip or seal may be removed from an employee by any Customs officer designated by the district director. In addition, the district director may revoke or suspend access to the Customs security area for any of the following reasons:

(i) The approved identification card, strip, or seal was obtained through fraud or the misstatement of a material fact;

(ii) The employee is convicted of a felony, or convicted of a misdemeanor involving theft, smuggling, or any theft-connected crime;

(iii) The employee permits the approved identification card to be used by any other person, or refuses to openly display or produce it upon the proper demand of a Customs officer;

(iv) The continuation of privileges would, in the judgment of the district director, endanger the revenue or security of the area;

(v) The employee refuses or neglects to obey any proper order of a Customs officer, or any Customs order, rule, or regulation; or

(vi) The employee no longer requires access to the Customs security area for an extended period of time at the airport of issuance. In this instance the employer shall notify the district director in writing, return the strip or seal, and give information regarding the disposition of the approved identification card which was issued to the employee who no longer requires access. If the employee returns to duties in the Customs security area at the airport within 1 year, a Customs Form 3078, as required by paragraph (d) of this section, need not be submitted.

(2) The district director shall suspend or revoke access to the Customs security area by giving notice of the proposed action in writing to the employee with a copy of the notice to the employer. The notice shall be in the form of a statement specifically setting forth the grounds for revocation or suspension of the privilege and shall be final and conclusive upon the employee unless he files with the district director a written notice of appeal as provided in paragraph (j)(3) of this section.

(3) The employee may file a written notice of appeal from the revocation or suspension within 10 calendar days following receipt of the notice of revocation or suspension. The notice of appeal shall be filed in duplicate, and shall set forth the response of the employee to the statement of the district director. The employee, in his notice of appeal, may request a hearing.

(4) If a hearing is requested, it shall be held before a hearing officer designated by the Commissioner or his designee within 30 calendar days following the request. The employee shall be notified of the time and place of the hearing at least 5 calendar days before the hearing.

(5) The employee may be represented by counsel at the revocation or suspension hearing. All evidence and testimony of witnesses in such proceeding, including substantiation of charges and the answer thereto, shall be presented with both parties having the right of cross-examination. A stenographic record of the proceedings shall be made and a copy furnished to the employee. At the conclusion of the proceedings or review of a written appeal, the hearing officer or the district director, as the case may be, shall promptly transmit all papers and the stenographic record of the hearing, if held, to the Commissioner of Customs or his designee, together with his recommendation for final action.

(6) Following a hearing and within 10 calendar days after delivery of a copy of the stenographic record, the employee may submit to the Commissioner of Customs or his designee, in writing, additional views and arguments on the basis of the record.

(7) If neither the employee nor his attorney appear for a scheduled hearing, the hearing officer shall conclude the hearing and promptly transmit all papers with his recommendation to the Commissioner or his designee.

(8) The Commissioner or his designee shall render his decision, in writing, stating his reasons therefor, with respect to the action proposed by the hearing officer or the district director. The decision shall be transmitted to the district director and served by him on the employee.

(k) When an approved identification card, strip, or seal is required under paragraph (b) of this section, and the district director determines that the application for the identification card, strip, or seal cannot be administratively processed in a reasonable period of time, an employer may, upon written request, be issued a temporary identification for his employee. The employer must satisfy the district director that a hardship to his business would result pending issuance of an approved identification card, strip, or seal.

(1) The temporary identification shall be valid for a period of 60 days. The district director may renew the temporary identification for additional 30-day periods if he determines that the circumstances under which the temporary identification was originally issued continue to exist. The temporary identification shall be destroyed by the district director when the permanent approved identification card, strip, or seal is issued, or the privileges granted thereby are withdrawn.

(2) The provisions of this paragraph shall also apply to temporary employees and official visitors requiring access to the Customs security area. In the case of temporary employees, the identification shall be valid for a period of 30 days. In the case of official visitors, the temporary identification shall be valid for the day of issuance only. Temporary employee and official visitor identification are renewable for periods equal to their original period of validity.

(3) The temporary identification may be revoked and access to the Customs security area denied at any time if, in the judgment of the district director, continuation of the privileges granted thereby would endanger the revenue or if the holder of the temporary identification refuses or neglects to obey any proper order of a Customs officer, or any Customs order, rule, or regulation.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: August 27, 1986.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, September 12, 1986 (51 FR 32448)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani

Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
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Senior Judges

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Nils A. Boe

Clerk

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Decisions of the United States Court of International Trade

(Slip Op. 86-88)

A.N. DERINGER, INC. A/C E-Z-EM Co., INC., PLAINTIFF V.
UNITED STATES, DEFENDANT

Court No. 83-8-01192

Before TSOUCALAS, *Judge*.

MEMORANDUM OPINION AND ORDER

Plaintiff challenges the classification of imported barium sulfate under item 417.80, TSUS, as other barium compounds, claiming that the correct classification is natural ground barium sulfate under item 472.12, TSUS.

Held: The imported barium sulfate (barytes) subject to an acid leaching process are not so advanced in value or condition that they have become something other than natural ground barium sulfate within the meaning of that tariff term and thus, are properly classifiable under item 472.12, TSUS.

[Plaintiff's motion for summary judgment granted; defendant's cross-motion for summary judgment denied.]

(Decided September 3, 1986)

Siegel, Mandell and Davidson, P.C. (Allan H. Kamnitz, Michelle S. Benjamin and Brian S. Goldstein), for the plaintiff.

Richard K. Willard, Assistant Attorney General, Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice (Michael P. Maxwell and Veronica A. Perry) for the defendant.

TSOUCALAS, Judge: In this action, plaintiff challenges the classification by the Customs Service of certain imported barium sulfate. Plaintiff, A.N. Deringer, Inc., is the customshouse broker for plaintiff-importer, E-Z-EM Company, Inc., who uses the imported barium sulfate in the manufacture of x-ray preparations. Plaintiff claims that the merchandise is ground barium sulfate and should be classified under item 472.12, TSUS, as "Barium sulfate: Natural (barytes) * * * Ground" at a rate of \$3.25 per ton. The Customs Service classified the merchandise under item 417.80, TSUS, as "Barium compounds: Other" at a rate of 4.5% or 4.7% *ad valorem* depending on the date of entry.

The issue as to the correct classification centers on the acid leaching process to which the barytes are subjected before importation. It is claimed by plaintiff that this acid wash is employed to remove residual impurities found in the barytes ore source. Defendant, how-

ever, claims that the acid wash is a process which upgrades the barium sulfate whereby it is advanced in value and condition beyond the ground stage.

Plaintiff has moved, pursuant to USCIT R. 56, for summary judgment and defendant has cross moved for summary judgment. Each party alleges that there is no genuine issue of fact to be tried. In reviewing the statements of material facts, this Court agrees that there is no genuine issue as to a material fact.

STATEMENT OF FACTS

The merchandise in question is ground barium sulfate approximately 98%-99% pure as imported. The merchandise is mined in rock form from an ore source in Canada containing natural barium sulfate (barytes, BaSO_4) and iron carbonate (FeCO_3) particles in approximately equal proportion. The mined rock is crushed to a sand consistency, resulting in crushed ore. This crushed ore is then subjected to a process which separates the slurry from the sized fractions. These sized fractions then undergo a vibratory process which separates the heavy particles containing the barytes from the lighter unwanted debris. Substantial portions of iron carbonate and other debris are removed by subjecting the heavy particles to a wet magnetic separation process. While the barytes are now of a higher purity than when mined, they may still be stained with a thin film of iron carbonate or other acid soluble impurities which were in the ore. To cleanse the barytes of these impurities which were not removed by prior processes, they are subjected to a solution of 5 normal hydrochloric acid. The barytes crystals then seem whiter in appearance. The acid wash does not chemically change the barytes. The barytes are then washed in water to eliminate the acid. Wet grinding of the barytes is achieved with a small amount of sodium citrate as a grinding agent. There is no chemical reaction between the barytes and the sodium citrate and it does not impart any functional properties to the barytes. These barytes crystals are then spray-dried until they reach the consistency of free flowing powder. Completion of the aforementioned processes readies the merchandise for packing and shipment. The barytes do not form a new chemical composition as a result of these processes.

BACKGROUND

Plaintiff imported the barium sulfate from Canada. The merchandise entered the country through the port of Houlton, Maine, from May 27, 1981 through August 18, 1982, and was liquidated from October 20, 1981 through September 1, 1982. Plaintiff filed a protest on October 25, 1982 contesting classification of forty entries of the barium sulfate.¹ The protest was denied on March 23, 1983. Thereafter, plaintiff filed this action.

¹ Plaintiff has abandoned its claim regarding the merchandise under entry #82-230328 since the protest was not timely filed as to that entry, therefore, only 39 entries are within the protest under consideration.

The question presented to this Court is whether barium sulfate, which has been cleansed by an acid wash rendering it 98-99% pure, has been so advanced in value and condition that it is precluded from classification as natural ground barium sulfate under item 472.12, TSUS, and therefore, properly classified as other barium compounds under item 417.80.

DISCUSSION

Plaintiff argues that the acid leaching is a cleansing process which does not advance the barium sulfate in value or condition beyond the ground stage. Plaintiff claims 472.12 is an *eo nomine* provision which covers all grades and qualities of the article embraced by the tariff description.² Finally, plaintiff alleges that 472.12 is a more specific provision than 417.80 and therefore, if plaintiff's merchandise can be regarded as ground barytes, as a matter of law, the merchandise should be classified under 472.12.

Conversely, defendant advances two arguments why the barium sulfate is processed to such a point whereby it is advanced in value and condition beyond the ground state. First, it has acquired a new name: bleached barytes; and second, it has acquired a new use: for medical preparation. Further, defendant argues that industry experts establish that the term natural ground barite is not used in the industry to describe acid leached barium sulfate. Defendant concludes that the merchandise is not within the scope of item 472.12, TSUS, rather it is properly classified under 417.80 and therefore summary judgment is appropriate. Alternatively, defendant claims that if this Court must ascertain the meaning of "natural ground barium sulfate" that is an issue of fact and summary judgment is not warranted.

On a motion for summary judgment the court may not resolve or try factual issues. *Standard Commodities Import & Export Corp. v. United States*, 9 CIT—, Slip Op. 85-124 at 4 (Dec. 5, 1985). The sole function of the court is to determine whether any factual dispute exists which is material to resolution of the action. Summary judgment cannot be granted if any triable issue is raised. *Id.* at 4-5.

In determining the applicability of item 472.12 versus item 417.80, this Court must be guided by the rule of relative specificity. If an "article is described in two or more tariff provisions, it is to be classified under the provision which describes it most specifically." *W & J Sloane, Inc. v. United States*, 76 Cust. Ct. 62, 69, C.D. 4636, 408 F. Supp. 1392, 1397 (1976). See TSUS, General Interpretative Rule 10(c).

² Before importation, plaintiff sought a prospective ruling as to the classification of the barium sulfate in question. The Customs Service issued Customs Headquarters Ruling #064210, which indicated two reasons that the merchandise would not be classified under item 472.12. Initially, Customs identified the chief use of ground barium sulfate as a weighting agent in oil well drilling mud, which does not require the purity level of plaintiff's barium sulfate. Therefore, the Customs Service determined that the ground barium sulfate, as contemplated by item 472.12, would not ordinarily undergo the chemical advancements of the product in question. Secondly, Customs concluded that where an article was advanced by process in addition to grinding, and was substantially fit for its ultimate use, it could not be included within the tariff classification of natural ground barium sulfate. Thus, Customs stated that the product would be classified under item 417.80.

It should further be noted that in cases involving provisions in Schedule 4, TSUS, the scientific and technical meaning ascribed to tariff terms is applicable rather than the common meaning of these terms. *National Polychemicals, Inc. v. United States*, 58 CCPA 37, 41 n. 2, C.A.D. 1001, 433 F.2d 1327, 1329 n.2 (1979), See *Tariff Classification Study*, Schedule 4 at 2 (November 15, 1960). It is therefore appropriate to look to technical literature to analyze the uses and characteristics of barium sulfate. Barium sulfate may be derived artificially by treating a solution of barium salt with sodium sulfate; as a byproduct in the manufacture of hydrogen peroxide; and it may occur in nature as the mineral barite (barytes). *The Condensed Chemical Dictionary* at 109 (Tenth Ed. 1981). Furthermore, barium sulfate may be divided into grades: technical, dry, pulp, bleached, ground, floated, natural; C.P. (chemically pure); U.S.P. (United States Pharmacopeia); x-ray. *Id.* at 109.

Commercial barite is marketed in several forms: (1) as crude barite, washed free of clay and picked to remove adhering impurities; (2) as ground barite, obtained by grinding and purifying crude ore;³ and (3) as a barium compound. *McGraw-Hill Encyclopedia of Science & Technology*, Vol. 2 at 111 (1982). Before grinding, most barite is leached by the addition of sulfuric acid in lead lined tanks. Occasionally, sodium chloride and other chemical reagents are added. *Id.* at 111. A detailed list of known uses for barium sulfate includes: weighting mud in oil drilling; paper coatings; x-ray photography; and, as an opaque medium for gastrointestinal radiography. *The Condensed Chemical Dictionary, supra*, at 109. It is noted that in these references materials bleached barite is discussed within the topic *Barite*, while the analysis of distinct barium compounds follows in a separate discussion, nowhere mentioning bleached barite. See *McGraw-Hill Encyclopedia of Science and Technology*, Vol. 2 at 111 and *Encyclopedia of Chemical Technology*, Vol. 2 at 318 (1948).

The scientific and technical meaning of the tariff terms was recognized by Congress in revising the structure of the Tariff Schedules. The Tariff Commission reported to Congress that:

Schedule 4 is primarily a classification system for chemicals and closely related chemical products. It places all chemicals and related products in a systematic, logical arrangement, using terminology which takes cognizance of the vast changes which have occurred in the chemical field since 1930, and eliminates anomalies and archaic and illogical classification.

Tariff Classification Study, Schedule 4 at 2 (Nov. 15, 1960).

An analysis of the tariff provisions in issue reflects this attempt to logically arrange chemical products. The barium compounds provided for under item 417.80, TSUS, are those not named or not more specifically provided for elsewhere in the TSUS, such as the compounds covered by items 417.70-78 and 472.02-14. *Summaries*

³ One source even further divides this class into (a) coarsely ground and (b) finely ground—bleached and treated. See *Encyclopedia of Chemical Technology*, Vol. 2 at 319 (1948).

of *Trade and Tariff Information*, Schedule 4, Vol. 2 at 179 (1968). The *Summaries* enumerate some of the compounds covered under item 417.80: barium sulfide, barium chlorate, barium flouride, barium iodide, and barium titanate. Each one of these compounds except barium titanate is water-soluble and poisonous. *Id.* at 179. The compound barium sulfate is both insoluble and non-poisonous. *Encyclopedia of Chemical Technology*, Vol. 2 at 318 (1948). Schedule 4, Part 9, Subpart B (under which barium sulfate is classified) "comprises insoluble coloring materials of mineral origin, * * *." *Tariff Classification Study*, *supra* at 151. In the Tariff Schedules, the headnote to Subpart B states:

The term "pigments", as used in this subpart, means products consisting of fine solid particles or powder, in dry form, * * * or ground in or mixed with oil, water, or other vehicle, commonly known as pigments and suitable for [emphasis added] use in imparting color (including black and white) to paints, inks, rubber, plastics, linoleum, and other products.

It is noteworthy that precipitated barium sulfate (blanc fixe), which is listed in item 472.14 immediately following 472.12, is used for gastrointestinal x-ray work. *Chemicals of Commerce* at 93 (Snell & Snell, 2d Ed. 1952). Similarly, plaintiff's product is used in x-ray preparation.

It would seem classification of the imported barium sulfate under item 472.12 would avoid anomalies and illogical classifications, since scientific treatises describe barite by kind and grade. It is therefore appropriate to discern whether Congress intended item 472.12 to cover "grades or kinds" of natural ground barium sulfate and whether plaintiff's merchandise can properly be regarded within that context.

Where a provision in the Tariff Schedules is without stated limitation it may not be restricted by "implication to grades and kinds chiefly used for particular purposes, or suitable for such use." *Hayes-Sammons Chemical Co.; Hayes-Sammons Co. v. United States*, 56 Cust. Ct. 115, 122, C.D. 2618 (1966), *aff'd*, 55 CCPA 69, C.A.D. 935 (1968). In *Hayes-Sammons*, the issue was whether the term "barytes ore, crude" as used in paragraph 67 of the Tariff Act of 1930 referred only to material containing 90% or more of barium sulfate and used in the manufacture of lithopone, ground barytes, and barium chemicals. The testimony in that case revealed that before 1930 a barium sulfate content of over 90% was necessary for those uses. It seems that these were the chief commercial uses of barium sulfate before 1930 while the use for ground barytes in the oil drilling industry, requiring a lower barium sulfate content, developed after that time. 56 Cust. Ct. at 117-118. In *Hayes-Sammons*, the court declined to hold that the tariff term "crude barytes ore" impliedly

required a minimum barium sulfate content.⁴ "Congress could have easily specified the barium sulfate content requisite for the imposition of a duty if it had wished to tax only the product dealt in, but it chose to use a general term which included more than that." *Id.* at 118-119 (citing *United States v. Virginia Gin Co., Inc., W.H. Morton*, 48 CCPA 33, 37, C.A.D. 759 (1960)).

Similarly, the defendant asks this Court to imply a maximum barium sulfate content when applying the term ground barytes. However, in item 472.12, TSUS, as in the tariff provision at issue in *Hayes-Sammons*, there is no provision limiting this classification to the purity level of the barytes. *Hayes-Sammons*, 56 Cust. Ct. at 121. Therefore, it would appear that the barytes which plaintiff has imported, albeit purified, are indeed a "grade" of ground barytes, which is in fact encompassed by item 472.12. Of significance, is that the imported barytes have not undergone a chemical reaction by virtue of the acid wash, as conceded by defendant. Chemically they remain barium sulfate. Compare *United States v. C.J. Tower and Sons*, 43 CCPA 49, C.A.D. 608 (1955) (imported mineral held not to be crude where it was the result of a substantial chemical change).

Defendant argues, however, that the imported barytes are so advanced in value and condition by virtue of the acid leaching that they are no longer specifically provided for in 472.12. Plaintiff contends that the imported barytes are still identifiable and recognizable as natural ground barium sulfate. Unless the identity of the barytes is destroyed or converted into something else by processing, it remains within an *eo nomine* provision as long as the merchandise is so named. *Enrique Garza v. United States*, 66 Cust. Ct. 212, 217, C.D. 4192, 324 F. Supp. 91, 95 (1971).

If plaintiff's merchandise can be classified as natural ground baryte, then summary judgment should be granted in plaintiff's favor because "an *eo nomine* [provision] must prevail over words of general description which might otherwise include the article specially designated." *W & J Sloane, Inc. v. United States*, 76 Cust. Ct. 62, 69, C.D. 4636, 408 F. Supp. 1392, 1397 (1976) (citing *Chew Hing Lung v. Wise*, 176 U.S. 156, 160 (1900)). Central to this determination is whether the merchandise is advanced in value and condition from its ground state and whether the ultimate use of the article is relevant in this classification.

In *United States v. Sheldon & Co.*, 2 Ct. Cust. App. 485, T.D. 32245 (1912), the court concluded that gum resin was not advanced in value or condition from its crude state (oleoresin). This oleoresin (crude turpentine) was vaporized, permitting the turpentine to escape, whereupon the residue of the oleoresin was let off through strainers into a vat. This residue, the resin content, then passed through screens which removed the chips, barks, insects and dirt

⁴ In its decision, the court relied on the reasoning in *United States v. Virginia Gin Co., Inc., W.H. Morton*, 48 CCPA 33, C.A.D. 759 (1960). The issue in both cases was essentially identical. In *Virginia Gin* the appellate court observed that technical references define crude barytes as containing 90% barium sulfate and therefore, recognize that there are commercial grades of crude barytes ore.

which accumulated in the reclamation of the oleoresin from the trunk of the tree. *Id.* at 487. There was no change in the resin per se, merely a restoration to its crude or natural condition. The court did not consider persuasive that crude turpentine as it exudes from the trees and "unstrained" resin are sometimes put on the market without undergoing the aforementioned process. The court stated:

The record shows that a variety of grades of resin are produced. There is a consequent variety of prices dependent upon the grade of the article. Among the well recognized grades of resin are those dependent upon color. * * * By the slightest change in the process there would be produced a different grade.

Id. at 489. It can, therefore, be gleaned from this decision that a difference in market price and a difference in the item's color do not automatically determine classification. Thus, whether or not the "bleached barytes" are white in appearance and more costly, is not decisive in classification under 472.12.

There can be two grades of an article which differ only by the presence of impurities in one of the grades. If these impurities are no part of the article itself, and, can be removed without changing the character of the article per se, even if slightly adding to its value, this is not advancing the article in value or condition. *Id.* at 490-491. If this were not the case, then the term "not advanced in value or condition" would mean only an article "in its native state, in the bowels of the earth, in the heart of the tree, or in its other original place of discovery, wherefore no article the subject of commerce could respond to that definition." *Hampton, Jr., & Co. v. United States*, 6 Ct. Cust. App. 392, 395, T.D. 35926 (1915).⁵

Where, after processing, the imported material contains a greater percentage of a substance than did the ore when taken from the ground, this cannot be considered advancing the material in value or condition. *C.J. Tower & Sons v. United States*, 26 Cust. Ct. 48, C.D. 1297 (1951). In that case zirconium ore (zirkite), containing 75% zirconium oxide and the gangue comprising the other 25%, was processed to increase the zirconium oxide from 75% to 95% concentration. Removal of the undesirable constituents was accomplished by adding coke and iron borings to the zirconium ore, fusing the mixture, and then cooling it to remove the unwanted material. The court held that the imported merchandise "still consists of zirconium oxide, although in a more concentrated form. The process through which it has been placed has not advanced the ore in value from the condition as it is found in the earth. It has not acquired a new name or a new use." *Id.* at 54. Defendant, relying on *Tower*, claims that the acid leaching process produces a barium sulfate product with a new name and new use. Nevertheless, as mentioned, technical treatises recognize that barite may be bleached (thereby

⁵ Imported molybdenite, freed from its natural rock or gangue formation by a process of crushing and flotation, was not itself crushed. The court held that this was a process necessary to produce the article from its native condition into its imported condition without affecting its per se character and did not constitute an advancement in value or condition.

acquiring the name "Bleached barytes") and may be used for x-ray preparation. Therefore, it does not appear that a new name has been acquired or a new use has been developed.

The affidavits of George Cable and John Sloan, submitted by defendant, do not contradict what has been cited from other scientific authorities. Mr. Cable stated that Pfizer, the company that employs him as a Technical Service Manager, produces bleached barytes called "No. 1 Barytes." These white barytes can be produced from naturally white barium sulfate ore, or by acid leaching barium sulfate ore which is darker in color. He further states that natural ground barite is used in applications where whiteness is not required. Mr. Cable's affidavit does nothing more than reinforce the principle that an article in nature may have different grades depending upon color. See *United States v. Sheldon*, *supra*.

John P. Sloan, Jr. is Manager of Quality Assurance at Magobar, a producer of oil well drilling fluids materials. In his opinion, the term natural ground barite (barytes) would not normally be used to describe natural barium sulfate which has been so advanced in purity to be considered a medical grade. Nevertheless, how a product is usually offered in the trade does not prevent it being offered in less usual forms. *International Selling Corp. v. United States*, 62 Cust. Ct. 23, 27, C.D. 3669, 294 F. Supp. 642, 645 (1969). Mr. Sloan's exposure to barite has been mainly in the oil well drilling industry where the baryte application is of a 75%-92% barium sulfate content. References indicate that at least 90% of ground barite is used as a weighting agent in the oil well drilling industry now, see *Summaries*, *supra*, at 172, even though this use is not the only one recognized.

While the Tariff Schedules distinguish crude barium sulfate from ground barium sulfate, Congress did not provide for barium sulfate to be separately classified according to color, purity or ultimate use. Whether or not "natural ground barite" is of a medical grade and could be used for its ultimate purpose is not dispositive. The fact that an imported article is fit for its present use might be decisive in some cases, but is not a universal or safe test. *United States v. Sheldon & Co.*, 2 Ct. Cust. App. 485, 494 (1912) (citing *Littlejohn v. United States*, 119 Fed. Rep. 483, 484 (1902)). See also *International Selling Corp. v. United States*, 62 Cust. Ct. at 27, 294 F. Supp. at 645 (absent a restriction in the Tariff Schedule to the contrary, an article ready for its final and ultimate use is still classified under the *eo nomine* designation.)

Plaintiff has submitted two affidavits, one from Irwin Rosenblum, a chemical engineer formerly employed by E-Z-EM, and one from Joseph Riina, a vice president at E-Z-EM. These affidavits indicate that the merchandise in issue is commercially sold and known as natural ground barite. Defendant has claimed in the alternative that a triable issue of fact has been raised by the conflicting statements of the affiants. However, defendant's affidavits do not dispute

that the barytes have not undergone a chemical reaction. What is in issue is the definition of the tariff term and this is a question of law. *Daw Industries, Inc. v. United States*, 714 F.2d 1140, 1141 (Fed. Cir. 1983).

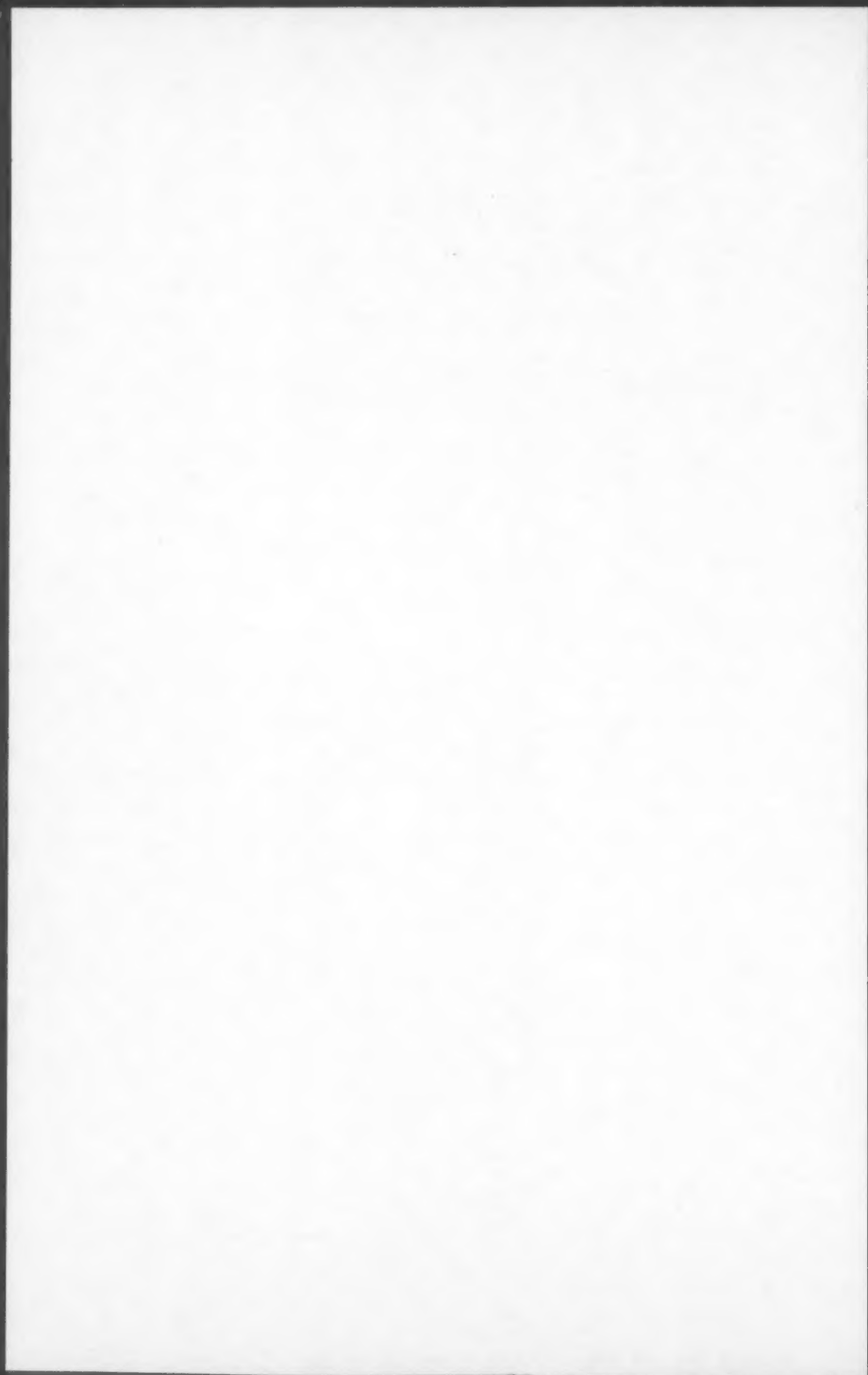
Therefore, it must be concluded that plaintiff's imported barium sulfate is natural ground barite properly classifiable under item 472.12. This is an *eo nomine* provision without any stated limitation as to industrial or medical use. The acid leaching performed on the barytes does not cause a new product to be manufactured but rather a more pure grade of ground barite is achieved. This grade of barytes is not so advanced in value or condition as to remove it from the classification of natural ground barite. As defendant admits, the acid leaching does not act on the barytes itself but rather acts on the impurities. The cited authorities reveal that a form of cleansing acting to remove impurities which does not change the article itself, except perhaps to make it more pure or concentrated, does not advance the article in value or condition.

Therefore, in light of the above, plaintiff's motion for summary judgment classifying the imported merchandise as barium sulfate, natural, ground, under item 472.12, TSUS, is granted and defendant's cross-motion is denied.

Judgment will be entered accordingly. So ordered.







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